

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-017245

10/13/2011

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nixon
Deputy

ARIZONA BANK & TRUST

SCOTT B COHEN

v.

JOEL A LINDGREN, et al.

ADAM B DECKER

RULING

The Court has considered the Defendants' (collectively "Lindgren"), Motion for Summary Judgment and Statement of Facts, Plaintiff's, (Arizona Bank & Trust) Response and Controverting Statement of Facts, the Reply, and argument of counsel.

Lindgren urges two theories to support its motion for summary judgment. First, this case was previously dismissed by abatement and, therefore, the claims asserted in the reinstated case are time barred. Second, since the record establishes that there is no outstanding deficiency, summary judgment is appropriate.

Deficiency Action

Arizona Bank & Trust brought a deficiency action following the trustee's sale of the property at issue.

33-814. Action to recover balance after sale or foreclosure on property under trust deed

A. Except as provided in subsections F and G of this section, *within ninety days after the date of sale of trust property* under a trust deed pursuant to § 33-807, an

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action may be maintained to recover a deficiency judgment against any person directly, indirectly or contingently liable on the contract for which the trust deed was given as security including any guarantor of or surety for the contract and any partner of a trustor or other obligor which is a partnership.

* * * *

(Italics added)

There is no dispute that the original Complaint for a deficiency judgment was filed within 90 days of the date of sale of the trust property.

Reinstatement

The Complaint was dismissed on December 2, 2009, pursuant to Rule 4(i), because no defendants were served. On February 19, 2010, the Court signed an Order reinstating the case and placing it on the inactive calendar until June 30, 2010.

At the outset, the Court agrees that an Order of reinstatement is procedurally different from an Order allowing for a new action to be filed. Under a reinstatement analysis, the Court found “good cause” for reinstatement and the Court’s Order placing the case on the inactive calendar governs.

A.R.S. §12-504(A)

Since the defendants present an argument for dismissal based on A.R.S. §12-504(A), the Court considers the application of the statute to the facts here.

Rule 4(i), Ariz. R. Civ. Pro., did not eliminate the doctrine of abatement. “An action still abates if a summons is not served within the time limits prescribed by the procedural rules.” *Schwartz v. Arizona Primary Care Physicians*, 192 Ariz. 290, 294 (App. 1998). In this case, the dismissal for failing to serve process was abatement.

In *Schwartz*, the Court discussed the application of A.R.S. §12-504(A).

Like many other states, Arizona has a savings statute that allows parties the opportunity, in some circumstances, to refile a dismissed claim after the statute of limitations has run:

If an action is commenced within the time limited for the action, and the action is terminated *in any manner other than by abatement, voluntary dismissal,*

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dismissal for lack of prosecution or a final judgment on the merits, the plaintiff... may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination. If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

A.R.S. §12-504(A) (emphasis added). By the terms of the statute, whether a party's right to refile a lawsuit is absolute or discretionary depends upon the reason for the termination of the action. If the Schwartzes' action had abated, it could be refiled only by leave of the court, because the statute of limitations had expired. *See id.* If the action were terminated for insufficiency of process, however, the statute entitles the Schwartzes to refile their complaint as a matter of right. *See id.*; *Janson v. Christensen*, 167 Ariz. 470, 472, 808 P.2d 1222, 1224 (1991). In *Janson*, the supreme court reasoned that the legislature's failure to list insufficiency of process as a discretionary item in the savings statute demonstrates that a plaintiff whose case was dismissed for insufficiency of process has an absolute right to refile. *See* 167 Ariz. at 472, 808 P.2d at 1224.

On February 19, 2010, the Court, exercised its discretion and placed the case on the inactive calendar until June 30, 2010. In the Motion to Reinstate, Plaintiff cited its attempts to locate and personally serve the Defendants. The Court found that “good cause” existed and granted the Motion. Based on the Court’s Order, the action was commenced within three months of the December 2, 2009 dismissal date. Furthermore, service by publication was obtained approximately four months from the initial dismissal. In other words, the action was commenced and served well before the six month period from termination as required by A.R.S. §12-504(A).

Under these circumstances, the action is not precluded by abatement.

Deficiency

The parties’ conflicting evidence, *i.e.* February 23, 2009 Appraisal and Brokers Price Option, regarding the value of the property creates a material issue of fact which precludes summary judgment.

IT IS THEREFORE ORDERED denying the Defendants’ Motion for Summary Judgment in its entirety.

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ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.